

EXHIBIT A
SAMPLE NON-DISCLOSURE AGREEMENT

THIS MUTUAL NONDISCLOSURE AGREEMENT is made and entered into, as of the last date entered below (“Effective Date”), between _____ (“Company 1”) and _____ (“Company 2”). Each of Company 1 and Company 2 may be referred to herein as a “party” and collectively as the “parties”.

- This “preamble” sets the agreement up in terms of who the parties to the agreement are and when the agreement takes effect.

Purpose. The parties wish to explore a business opportunity of mutual interest and in connection with this opportunity (the “Purpose”), each party may disclose or have already disclosed to the other certain confidential technical and business information which the disclosing party desires the receiving party to treat as confidential. Both Company and Company 2 can be a disclosing party or a receiving party of Confidential Information under this Agreement. Each party shall include such party’s affiliates, officers, directors, employees, agents, consultants, independent contractors, or others bound by restrictions on disclosure and use, as well as a subsequent purchaser of a party, a parent, a subsidiary, or corporate affiliate.

- The “Purpose” section outlines the reason for entering into a relationship of confidentiality. Importantly, this section defines either party as a party who may disclose or receive confidential information under this agreement, making the agreement mutual – so as to avail either party of the benefits of the agreement.
- If one party is the only party to reasonably be expected to disclose confidential information under the agreement, said party may push for a unilateral agreement, rather than a mutual agreement.
 - For example, in the above situation, Company may define itself solely as the receiving party while defining Company 2 as the disclosing party, thereby creating a unilateral agreement where only Company’s information is protected under the agreement.

Confidential Information. “Confidential Information” means any information disclosed previously or in the future by either party to the other party related to the Purpose, which is designated as “Confidential,” “Proprietary” or some similar designation. Confidential Information may be disclosed either directly or indirectly, in writing, orally or by inspection of tangible objects (including without limitation documents, prototypes, samples, plant and equipment, research, product plans, products, services, customer lists, software, developments, inventions, processes, designs, drawings, engineering, hardware configuration, marketing materials or finances). Confidential Information may include, for example, procedures, developments, results, data, know-how, marketing strategies, protocols, clinical trial protocols, clinical reports, investigator brochures, technologies, inventions, business plans, or unpublished patent applications.

- This section sets the boundaries and limits of what can be defined as confidential information under this agreement, and thus decides what can be governed by this agreement. If the relationship has been established prior to this agreement, information that has been disclosed previously should be captured under this agreement, as is shown above. Additionally, some parties find that having only written information qualify as

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confidential information provides the most adequate notice and best way to keep records of what they are obligated to keep confidential and will thus often push for the removal of orally disclosed information from the definition of confidential information.

- For example, a party wishing to remove orally disclosed information from the definition of confidential information may stipulate that orally disclosed information may be protected under the agreement so long as the disclosing party summarizes the oral disclosure in a written document within a certain number of days from the disclosure.

Exceptions

(i) at the time of disclosure is, or thereafter becomes publicly known and made generally available after disclosure by the disclosing party to the receiving party through no fault or inaction of the receiving party;

(ii) corresponds in substance to that developed by the receiving party and is already in the possession of the receiving party prior to the time of disclosure by the disclosing party as shown by the receiving party's files and records;

(iii) corresponds in substance to information that is obtained by the receiving party at the time of the disclosure from a third party without a breach of such third party's obligations of confidentiality;

(iv) is independently developed by the receiving party without use of or reference to the disclosing party's Confidential Information, as shown by documents and other competent evidence in the receiving party's possession; or

(v) is required by law, court order or other governmental order or request to be disclosed by the receiving party,

- The exceptions to confidential information provide important protection against breach of the confidentiality provisions with respect to information that may technically fall under the definition of confidential information but, for one reason or another, do not qualify for protection under this agreement. For example, a receiving party should not be restricted from disclosing information originally disclosed as confidential when it is also available in the public domain.

Non-use and Non-disclosure. Each party shall not use the Confidential Information of the other party for any purpose except to evaluate and engage in discussions concerning a potential business relationship between the parties. Neither party shall disclose any Confidential Information of the other party to third parties. If any party makes copies of the Confidential Information of the other party, such copies shall also constitute Confidential Information and any and all confidential markings on such documents shall be maintained. Neither party shall reverse engineer, disassemble or decompile any prototypes, software or other tangible objects which embody the other party's Confidential Information and which are provided to the party hereunder.

- This section defines the obligations of each party with respect to their use of the confidential information. Here, again, the purpose of the agreement comes in to play, as it represents the only avenue for disclosure of confidential information.

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Maintenance of Confidentiality. Each party shall take reasonable measures to protect the secrecy of and avoid disclosure and unauthorized use of the Confidential Information of the other party. Without limiting the foregoing, each party shall take at least those measures that it takes to protect its own most highly confidential information, and shall promptly notify the disclosing party of any misuse or misappropriation of Confidential Information of which it becomes aware. Each party shall disclose Confidential Information only to those officers, directors, employees and contractors who are required to have the information in order to evaluate or engage in discussions concerning the contemplated business relationship, and such party shall remain responsible for compliance with the terms of this Agreement by its officers, directors, employees and contractors.

- This section defines the obligations of each party with respect to their protection of the other party's confidential information. Typically, the parties will require each other to take at least those measures they take to protect their own confidential information, as shown above, and often require at least a commercially reasonable standard of care.

NO WARRANTY. ALL CONFIDENTIAL INFORMATION IS PROVIDED "AS IS." NEITHER PARTY MAKES ANY WARRANTIES, EXPRESS, IMPLIED OR OTHERWISE, REGARDING ITS ACCURACY, COMPLETENESS OR PERFORMANCE.

- No warranty sections are important as they limit liability incurred by dependence of one party on the other's confidential information. Typically, this section is capitalized so as to be conspicuous enough to provide adequate notice.

No License. This Agreement shall not be construed as creating, conveying, transferring, granting or conferring upon either party any rights, license or authority in or to the information exchanged, except the limited right to use Confidential Information specified in the "Exceptions". Furthermore and specifically, no license or conveyance of any intellectual property rights is granted or implied by this Agreement.

- This "No License" section is included as a safeguard against any possible assumption that the disclosure of confidential information under this agreement grants any further, broader rights to the subject of the confidential information.

No Obligation. Neither party has an obligation under this Agreement to purchase any service, goods, or intangibles from the other party. Furthermore, both parties acknowledge and agree that the exchange of information under this Agreement shall not commit or bind either party to any present or future contractual relationship (except as specifically stated herein), nor shall the exchange of information be construed as an inducement to act or not to act in any given manner.

- This section is often included so as not to create an assumption of an obligation to go forward with the purpose, as defined in the agreement. For example, simply because the two parties enter into a nondisclosure agreement in order to evaluate a possible business relationship, one party, or both, may choose to move in a different direction and should not be obligated to proceed by this agreement.

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Remedies. If there is a breach or threatened breach of any provision of this Agreement, it is agreed and understood that the non-breaching party shall have no adequate remedy in money or other damages and accordingly shall be entitled to seek injunctive relief; provided however, no specification in this Agreement of any particular remedy shall be construed as a waiver or prohibition of any other remedies in the event of a breach or threatened breach of this Agreement.

- This section defines the remedies available to a party in the event of a breach or threatened breach of any provision of the agreement. Here, however, some parties may attempt to limit the availability of indirect or non-consequential damages depending on what the party brings to the table. Parties that may share sensitive product information may find it beneficial to keep indirect or non-consequential damages on the table, as damages from a breach with respect to such information would likely be indirect or non-consequential.

Entire Agreement. This Agreement states the entire agreement between the parties concerning the disclosure of Confidential Information and supersedes any prior agreements, understandings, or representations with respect thereto. Any addition or modification to this Agreement must be made in writing and signed by authorized representatives of both parties. This Agreement is made under and shall be construed according to the laws of the State of _____, U.S.A. In the event that this agreement, is breached, any and all disputes must be settled in a court of competent jurisdiction in the State of _____, U.S.A.

- This standard clause simply solidifies the clauses of this agreement as the entire form of the agreement between the two parties with respect to nondisclosure of confidential information. This clause also solidifies the requirement of both party's consent in writing to amend or modify the agreement.
- In addition, the choice of law provision stipulates which state's laws shall govern, and where venue will be allowed.

Term. The confidentiality obligations of each receiving party as defined herein shall endure for a period of three (3) years following the date of last disclosure under this Agreement.

- The term of a nondisclosure agreement must be sufficient ensure that sensitive information will not suddenly be free of confidentiality restrictions within a short time of disclosure. Here, three years should be sufficient in that any sensitive information relayed will likely have run its course within three years whether as a fully realized product or as an outdated and unworkable idea.

Assignment. Neither party may assign its rights or obligations under this Agreement without the prior written consent of the other party. Any attempted assignment in violation of this Section 11 will be null and void.

- Here, many parties would like to be given the right to consent or deny an assignment of the agreement by the other party because they would like to determine with whom they are contracting. Parties may choose however, to define, for example, assignment to an entity who purchases all of the assets of a party as an assignment not requiring consent. In addition, parties may choose to add language that states that "consent may not be unreasonably withheld or delayed."

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Miscellaneous. If any of the provisions of this Agreement are found to be unenforceable, the remainder shall be enforced as fully as possible and the unenforceable provision(s) shall be deemed modified to the limited extent required to permit enforcement of the Agreement as a whole.

- This section is a fairly standard clause that keeps the agreement intact in the event that one or more sections are found to be unenforceable.

WHEREFORE, the parties acknowledge that they have read and understand this Agreement and voluntarily accept the duties and obligations set forth herein.

Works Cited:

Mutual Nondisclosure Agreement, Entrepreneur, <http://www.entrepreneur.com/formnet/form/852>.

McGarrigle, Phillip, Nondisclosure Agreement, Biotechnology Law 2015, Santa Clara University.

Mutual Nondisclosure Agreement, IP Watchdog, <http://www.ipwatchdog.com/tradesecret/mutual-confidentiality-agreement/>.